

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-7045

In The
United States Court of Appeals
For The Second Circuit

MARGIE L. UPTON, individually and as Administratrix of the
Estate of LARRY L. UPTON, deceased, and as Mother and
Natural Guardian of KARI LEE UPTON, KIM MARIE UPTON
and JODI LYNN UPTON, Minors, et al.,

Plaintiffs-Appellants,

v.

THE DEPARTMENT OF CIVIL AVIATION
OF THE EMPIRE OF IRAN,

and

THE EMPIRE OF IRAN,

Defendants-Appellees.

On Appeal from The United States District Court
For the Southern District of New York

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

KREINDLER & KREINDLER
Attorneys for Plaintiffs-Appellants
99 Park Avenue
New York, New York 10016
(212) 687-8181

Of Counsel:
Melvin I. Friedman
Alan J. Konigsberg
James D. Veach

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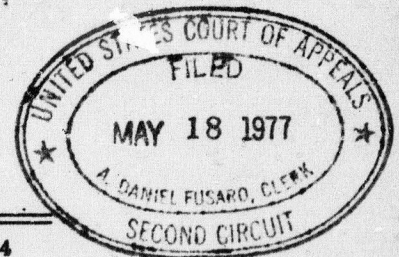


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STATEMENT

This Reply Brief is respectfully submitted in
opposition to defendants Empire and Department's contention

that the Foreign Sovereign Immunities Act of 1976^{1/} requires dismissal of plaintiffs' action. Defendants so contend even though they still purport to reserve the defense of sovereign immunity.

Plaintiffs contend that the Act does not apply and, even if it does, this case falls within one of the Act's exceptions.

POINT I

THE SOVEREIGN IMMUNITIES ACT DOES NOT APPLY TO THIS CASE

Plaintiffs commenced their action on June 30, 1976, more than six months before the Sovereign Immunities Act took effect. Defendants were aware during the pendency of this action that the Act's passage was imminent, but took no steps to claim sovereign immunity. They should not now be permitted to take advantage of their reservation of the defense of sovereign immunity. Additionally, the language and legislative history of the Act demonstrates that it does not apply retroactively.

^{1/} Pub. L. No. 94-583 [H.R. 11315] (October 21, 1976), 90 Stat. 2891, to be codified as 28 U.S.C. §1330, 1602-11 et seq. All references to provisions of the Act to be codified will be to the United States Code.

The Sovereign Immunities Act does not provide for its retroactive application. Statutes will only be applied prospectively unless it appears from the statute or its legislative history that Congress clearly intended otherwise. Greene v. United States, 376 U.S. 149 (1964); Claridge Apts. Co. v. Commissioner of Int. Rev., 323 U.S. 141 (1944); Farmington River Power Co. v. Federal Power Comm., 455 F.2d 86 (2d Cir. 1972); Davis v. Rio Rancho Estates, Inc., 401 F.Supp. 1045 (S.D.N.Y. 1975). Statutes will be given retrospective operation only where this is "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." Greene, *supra* 376 U.S. at 160 quoting Union Pac. R. Co. v. Laramie Stockyards Co., 231 U.S. 190, 199 (1913).

The language of the Sovereign Immunities Act clearly indicates that it must be given prospective effect only.

"§1602. Findings and Declaration of Purpose
* * *

"Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."
[Emphasis added.]
28 U.S.C. §1602

Enacted into law on October 21, 1976, Congress deferred the Act's effective date until January 19, 1977. Pub. L. No. 94-583 §8; 90 Stat. 2898 (1976).

Contrary to defendants' assertion, Congress did not in enacting the Sovereign Immunities Act withdraw subject matter jurisdiction in actions against foreign governments. By setting forth methods through which service may be effected and judgments executed, Congress, if anything, expanded and clarified the jurisdiction of both federal and state courts with respect to said actions. Defendants point to nothing in either the Act or its legislative history which indicates an intent to withdraw subject matter jurisdiction over the plaintiffs' case.

To the contrary, at hearings on the proposed bill,

" . . . it was pointed out that the American citizens are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances, and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes."

[Emphasis added.]

H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. 6, reprinted in [1976] U.S. Code Cong. & Ad. News 7037 [House Report].

Thus, the purpose of the Act was not to restrict or withdraw subject matter jurisdiction from federal courts but rather to make these courts a more effective means through which United States citizens may obtain redress against foreign governments.^{2/}

^{2/} Plaintiffs maintain that the Act does provide subject matter jurisdiction for their action in the event the Act were applied to their case. Plaintiffs' Reply Brief, infra, Point II.

The cases relied upon by the defendants are not apposite (Dfts. Brief at 14-15). In each, Congressional intent was clear. The explicitly stated purpose of the legislation was to restrict rather than, as here, define and expand subject matter jurisdiction.

One of the purposes of the Act was to deny to defendants the opportunity to "reserve" the defense of sovereign immunity to avoid submitting to the jurisdiction of United States courts. The proposed Bill was intended to adopt formally a restrictive theory of sovereign immunity and to end the uncertainty faced by plaintiffs suing foreign governments. Congress was concerned with the fact that the foreign state, and not the plaintiff, determined when and where a claim for sovereign immunity could be made.^{3/}

"From a foreign relations standpoint, the initiative is left to the foreign state. The foreign state chooses which sovereign immunity determinations it will leave to the courts, and which it will take to the State Department. The foreign state also decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter [restrictive theory of sovereign immunity] criteria.

From the standpoint of the private litigant, considerable uncertainty results."
House Report at 8-9, 7039

^{3/} See Letter from Office of the Legal Adviser, U.S. Dept. of State, Feb: 9, 1970, 64 AM.J. Int'l. L. 650 (1970); Lowenfeld, Litigating a Sovereign Immunity Claim, The Haiti Case, 49 N.Y.U. Law R. 377, 395 (1974).

Defendants could have submitted their claim of sovereign immunity to the State Department, but refused to do so. The defendants could also have submitted the issue of sovereign immunity to the Court below. Aerotrade, Inc. v. Republic of Haiti, 376 F.Supp. 1281, 1282 (S.D.N.Y. 1974). Had they done so the defense would have been rejected. Without State Department guidance, the defendants' claim would have been subject to the test established by this Court in Victory Transport Inc. v. Comisaria General, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied 381 U.S. 934 (1965). Defendants' ownership and operation of the public airport clearly did not come within any of the five "strictly political or public acts" listed in Victory Transport which would require recognition of a claim of sovereign immunity. Id. The defendants, having left this issue unresolved for almost a year, now seek to capitalize on a practice the Sovereign Immunities Act was intended to eliminate.

In summary, the Sovereign Immunities Act should not be applied to bar the plaintiffs' action. The language and legislative history of the Act reveal that it was neither intended to be applied retroactively nor to withdraw subject matter jurisdiction of federal courts over plaintiffs' pending action. Additionally, to permit the defendants to rely on their refusal to submit their claim of sovereign

immunity to either the State Department or the Court below in order to bar plaintiffs' access to a United States court is contrary to the intent and purpose of the Act.

POINT II

THE SOVEREIGN IMMUNITIES ACT
PROVIDES SUBJECT MATTER JURIS-
DICTION FOR PLAINTIFFS' ACTIONS

If the Sovereign Immunities Act is applied to this case, plaintiffs' action comes within an exception (§1605(a)(2)) contained therein. 28 U.S.C. §1605. Plaintiffs maintain that the methods of service utilized in commencing their action were adequate. Plaintiffs' Brief at 3-4, 6-10. If defendants must be served again pursuant to 28 U.S.C. §1608(a), plaintiffs will do so.

The Sovereign Immunities Act provides that a foreign state shall not be immune to the jurisdiction of United States Courts in any case:

" . . . in which the action is based . . . upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."
28 U.S.C. §1605(a)(2)

A. Defendants' Acts Occurred Outside the
Territory of the United States.

Plaintiffs' action arises out of and is based upon the defendants' negligent ownership, operation, maintenance, control, inspection and modification of the Mehrabad International Airport terminal building in Tehran, Iran. These acts or failures to act occurred outside the territory of the United States.

B. Defendants Acted in Connection with a Commercial
Activity Elsewhere

The defendants constructed the Mehrabad International Airport in connection with defendants' operation of its wholly owned and controlled air carrier, Iran National Airlines Corporation [Iran Air] which has offices and does business in New York and elsewhere in the United States (Plaintiffs' Brief at 5; A 123). The Record indicates that the terminal structure itself was paid for "partly out of petrol income and partly by Iran Airlines." (A 181.)

The relationship between the defendants and their wholly owned and controlled air carrier, Iran Air, is clear (Plaintiffs' Brief at 4-6). Defendants concede that the Mehrabad Airport is a "government-operated" airport and that defendant Department is responsible for "the administration, operation and maintenance . . ." of the airport (Defendants' Brief at 4). Plaintiffs' decedents and plaintiff Caswell were waiting to board an Iran Air flight when the collapse occurred (A 5 ¶5, Plaintiffs' Brief at 2).

The operation of an airport has consistently been held to be a proprietary or non-governmental function subjecting municipalities owning and operating those airports to liability for negligence. Crawford v. City & County of Denver, 278 F.Supp. 51 (D.Col. 1967); Wells v. City of Vancouver, 77 Wash.2d 800, 467 P.2d 292 (1970); Harrelson v.

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